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Supreme Court of the United States

CARLOTA COPPER COMPANY,

Petitioner,

v.

FRIENDS OF PINTO CREEK, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF OF THE NATIONAL ASSOCIATION OF CLEAN WATER AGENCIES, CALIFORNIA ASSOCIATION OF SANITATION AGENCIES, LEAGUE OF CALIFORNIA CITIES, AS *AMICI CURIAE* IN SUPPORT OF PETITIONER CARLOTA COPPER COMPANY

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Cal. Regional Water Quality Control Board, North Coast Region, Order No. R1-2006-0045 (Sept. 20, 2006), available at http://www.waterboards.ca.gov/northcoast/board_decisions/adopted_orders/pdf/2006/061003_0045_Santa RosaWDRs.pdf 18

Cal. Regional Water Quality Control Board, San Francisco Bay Region, Mercury in San Francisco Bay, Proposed Basin Plan Amendment and Staff Report, etc. (Aug. 1, 2006), available at http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/tmdls/sfbaymercury/sr080906.pdf 16, 23, 25

Cal. Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2007-0077 (Nov. 1, 2007), available at http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/tmdls/sfbaymercury/r2-2007-0077final.pdf 16

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Colo. Dept. of Pub. Health and Env't., Colorado Pollutant Trading Policy 1 (Oct. 2004), available at http://www.cdphe.state.co.us/wq/PermitsUnit/PolicyandGuidance/TradingPolicy.pdf 14

EPA, 2006 Section 303(d) List Fact Sheet for California, available at http://iaspub.epa.gov/waters10/state_rept.control?p_state=CA&p_cycle=2006#TPOL 21

EPA, Assessment Data for the State of California Year 2004, available at http://iaspub.epa.gov/waters10/w305b_report_control.get_report?p_state=CA&p_cycle= 5

EPA, Assessment Data for the State of Nevada Year 2006 5

EPA, Draft Framework for Watershed-Based Trading (May 30, 1996), available as document number 800R96001 at http://nepis.epa.gov/EPA/html/Pubs/pubtitleOW.htm 11, 12

EPA, Fact Sheet Water Quality Trading Policy (Jan. 13, 2003), available at http://www.epa.gov/owow/watershed/trading/finalpolicy2003.pdf 11, 12

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EPA, List of Impaired Waters for 2006 (2006), available at http://iaspub.epa.gov/tmdl_waters10/waters_list.control?state=MD&wbtype=BAY&p_cycle=2006 15

EPA, Memorandum: Clarification Regarding "Phased" Total Maximum Daily Loads 3 (Aug. 2, 2006), available at http://www.epa.gov/owow/tmdl/tmdl_clarification_letter.html 25

EPA, National Water Quality Inventory: Report to Congress, 2002 Reporting Cycle (October 2007) 5

EPA, State and Individual Trading Programs, www.epa.gov/owow/watershed/trading/tradingmap.html 14

EPA, Total Maximum Daily Load for Copper in Pinto Creek, Arizona (2001), available at http://www.epa.gov/region09/water/tmdl/pinto/pinto.pdf 24

EPA, Total Maximum Daily Loads: National Section 303(d) List Fact Sheet, available at http://oaspub.epa.gov/waters/national_rept.control 21

EPA, Water Quality Trading Assessment Handbook, (Nov. 2004), available at http://www.epa.gov/owow/watershed/trading/handbook/docs/ch1-national-wqt-handbook-2004.pdf 12

EPA, Water Quality Trading Toolkit for Permit Writers 4 (Aug. 2007), available at http://www.epa.gov/npdes/pubs/wqtradingtoolkit_fundamentals.pdf 11, 13, 14

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EPA, Watershed-based National Pollutant Discharge Elimination System (NPDES) Permitting Technical Guidance (Aug. 2007), available at http://www.epa.gov/npdes/pubs/watershed_techguidance_entire.pdf (last visited June 27, 2008) 19

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U.S. Census Bureau, 2004, Table 2a, U.S. Interim Projections by Age, Sex, Race and Hispanic Origin, available at http://www.census.gov/ipc/www/usinterimproj/ 5

Water Env't Research Found., Executive Summary—Credit Trading in the Fox-Wolf Basin: Exploring Legal, Economic, and Technical Issues (2001) 12

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The National Association of Clean Water Agencies [hereinafter NACWA], California Association of Sanitation Agencies [hereinafter CASA] and League of California Cities [hereinafter League] [collectively hereinafter Associations] are trade and municipal associations that represent the interests of cities, counties, utilities and other local public agencies throughout the United States. Members of the Associations are responsible for the collection, treatment, disposal, and reuse of water—the most precious of commodities.

The Associations' members own and operate water and wastewater infrastructure in watersheds where waters fail to attain water quality standards established under the Federal Water Pollution Control Act, 33 U.S.C. §1251 *et seq.* [hereinafter CWA]. The decision of the United States Court of Appeal for the Ninth Circuit in *Friends of Pinto Creek v. EPA*, 504 F.3d 1007 (9th Cir. 2007) [hereinafter *Pinto Creek*] unduly restricts the ability of EPA and states

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[1] Pursuant to Rule 37.2(a) of the Rules of the Supreme Court of the United States, *amici curiae* provided timely notice of their intent to file this brief to counsel for Petitioner and Respondent. Counsel for Petitioner, Respondent and the Solicitor General of the United States furnished written consent to file this brief. Pursuant to this Court's Rule 37.6, this brief was not authored in whole or part by counsel for any party, and no person or entity other than *amici curiae* made a monetary contribution to this brief's preparation or submission.

to authorize discharges by new sources and new dischargers, including the Associations' members. Consequently, *Pinto Creek* will frustrate the ability and efforts of the Associations' members to provide critical municipal services in the most environmentally beneficial manner.

The Associations filing this brief are as follows:

NACWA is a trade association that represents the interests of more than 300 of the Nation's publicly owned treatment works [hereinafter POTWs]. NACWA's membership includes over 30 California public wastewater utilities and more than 60 public wastewater utilities within the Ninth Circuit's jurisdiction. Collectively, NACWA member agencies serve the majority of the sewered population in the United States and treat and reclaim more than 18 billion gallons of wastewater daily. NACWA advocates on behalf of its members in the legislative, regulatory and legal arenas.

CASA is a trade association of 114 public agencies that collect, treat and recycle wastewater for more than 36 million Californians. CASA is a national leader in identifying and resolving clean water and beneficial reuse issues to protect public health and the environment. CASA represents its members in legislative, regulatory and legal proceedings to ensure that all Californians have access to high quality wastewater treatment and water reclamation services.

The League is an association of 478 California cities dedicated to protecting and restoring the ability of local governments to provide for the public health, safety and welfare of their residents and enhancing the quality of life for all Californians. The League is advised by its Legal Advocacy Committee [hereinafter Committee], which consists of 24 city attorneys from all regions of the State. The Committee monitors litigation of concern to municipalities and identifies cases of statewide or national significance. The Committee identified this case as being of such significance.

SUMMARY OF ARGUMENT

A significant conflict exists between the Ninth Circuit's decision in *Pinto Creek*, the subject of this Petition, and this Court's decision in *Arkansas v. Oklahoma*, 503 U.S. 91 (1992) [hereinafter *Arkansas*]. This conflict comes before the Court as a direct split of authority between *Pinto Creek* and the decisions of two state courts—*In re Cities of Annandale & Maple Lake*, 731 N.W.2d 502 (Minn. 2007) [hereinafter *Annandale*] of the Minnesota Supreme Court and *Crutchfield v. State Water Control Board*, 612 S.E.2d 249 (Va.Ct.App. 2005) [hereinafter *Crutchfield*] of the Virginia Court of Appeals.[2] Resolution of the split will

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[2] The Virginia Supreme Court dismissed the appeal from the decision of the Court of Appeals without opinion. *Crutchfield v. State Water Control Board*, No. 051148 (Va. Sept. 27, 2005).

profoundly affect the ability of the Associations' members to provide essential public services—the provision of high quality wastewater treatment—to their growing constituencies.

For the significant policy reasons discussed herein, the Associations request that this Court grant the Carlota Copper Company's Petition for Certiorari to resolve the following question:

> Whether a regulatory authority may issue a permit under the National Pollutant Discharge Elimination System [hereinafter NPDES] program of the CWA to a new source or new discharger when the authority determines that the new discharge will be offset by remediating pollutants from other sources so as not to cause or contribute to the violation of water quality standards for the impaired water body.

The direct split of authority and the far-ranging policy implications of this important federal question warrant this Court's exercise of jurisdiction to grant certiorari under Sup. Ct. R. 10(a). It is neither feasible nor prudent for the Environmental Protection Agency [hereinafter EPA] and 45 states with delegated authority under the NPDES program to prohibit all new discharges to waters listed as impaired under Section 303(d) of the CWA. 33 U.S.C. §1313(d). The United States' population is anticipated to grow by 206 million people between the years 2000 and

2050,[3] and much of that growth will be in urban communities where many waters are listed as impaired.[4] *See, e.g.*, Maryland Dep't of the Env't, Maps and Water Resources Aid to Local Planning (2006), available at http://www.mde.state.md.us/Water/HB1141/Water_Quality_Maps.asp (last visited June 20, 2008) (reflecting extensive impairment for nutrients in Baltimore City and County). To address this growth and the resulting need to upgrade aging wastewater infrastructure, EPA and states combine traditional command and control NPDES permitting with the use of tools such as offsets and water quality trading. The use of offsets and trading may alleviate or prevent the impaired state of waters and provide other water quality benefits.

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[3] U.S. Census Bureau, 2004, Table 2a, U.S. Interim Projections by Age, Sex, Race and Hispanic Origin, available at http://www.census.gov/ipc/www/usinterimproj/ (last visited June 20, 2008).

[4] Approximately 45% of water bodies nationwide are classified as impaired under the CWA for failure to comply with water quality standards. *See generally* EPA, National Water Quality Inventory: Report to Congress, 2002 Reporting Cycle at ES-2 (October 2007). The percentage of impaired water bodies in some states, such as California, can be upwards of 90%. *See* EPA, Assessment Data for the State of California Year 2004, available at http://iaspub.epa.gov/waters10/w305b_report_control.get_report?p_state=CA&p_cycle= (last visited June 20, 2008). *Cf.* EPA, Assessment Data for the State of Nevada Year 2006 (impairment in 50-70 percent of assessed water bodies, notwithstanding that much of the state is largely uninhabited).

The Minnesota Supreme Court in *Annandale* found EPA's water quality trading policy and decision in this case, *In re Carlota Copper Co.*, 11 E.A.D. 692 (Sept. 30, 2004), available at http://www.epa.gov/eab/disk11/carlota.pdf (last visited June 27, 2008), persuasive on the meaning of "cause or contribute" in 40 C.F.R. §122.4(i) [hereinafter Section 122.4(i)]. Unlike *Pinto Creek*, *Annandale* properly construed this Court's decision in *Arkansas* to allow new discharges to impaired waters as part of a state's "long[-]range, area[-]wide program for water quality" where the discharges produce a net improvement in water quality. *Annandale*, 731 N.W.2d at 524.

New and more efficient wastewater treatment facilities such as those at issue in *Annandale* and *Arkansas* improve water quality, particularly after implementation of offsets that reduce net loading to receiving waters. Should *Pinto Creek* set the standard for a new source or new discharger to obtain a NPDES permit for discharges to the Nation's thousands of impaired waters, few if any public agencies will build or expand wastewater treatment plants—even as populations soar.

ARGUMENT

I. NEW DISCHARGES THAT REDUCE POLLUTION THROUGH THE USE OF OFFSETS DO NOT CAUSE OR CONTRIBUTE TO VIOLATIONS OF THE CWA

In *Pinto Creek*, the Ninth Circuit rejected EPA's reasonable interpretation of Section 122.4(i), which allows a new source or new discharger to discharge to an impaired water body if an offset achieved through reduction of an existing pollution source would improve overall water quality. The court ruled that a net improvement is not sufficient in that the potential discharger must demonstrate attainment of all applicable water quality standards before EPA may issue the permit. *Pinto Creek*, 504 F.3d at 1014. By misinterpreting the phrase "cause or contribute," the Ninth Circuit calls into question ongoing federal and state efforts to attain water quality standards. *Pinto Creek* will obstruct critical infrastructure projects that improve water quality while providing wastewater services to a growing population.

A. *Annandale* and *Crutchfield* Are Consistent With this Court's Decision in *Arkansas*

Pinto Creek, *Annandale* and *Crutchfield* involved proposed new discharges to impaired waters and turned on the meaning of Section 122.4(i). Section 122.4(i) generally prohibits the issuance of a NPDES permit to a new source or new discharger if its

discharge will "cause or contribute to the violation of water quality standards" for an impaired water body.[5] As the Minnesota Supreme Court recognized in *Annandale*, the meaning of "cause or contribute" in the regulation is ambiguous. *Annandale*, 731 N.W.2d at 522 ("[W]e conclude that 40 C.F.R. §122.4(i) is unclear and susceptible to different reasonable interpretations.").

In *Pinto Creek*, the Ninth Circuit disregarded the deference afforded to an agency's reasonable interpretation of its own regulation.[6] The court substituted its judgment for EPA's and held that under Section 122.4(i), a discharge from a new source or new discharger to an impaired water body causes or contributes to the violation of water quality standards—even where the pollution is offset in the same water body. *Pinto Creek*, 504 F.3d at 1012. The court distinguished *Arkansas* and claimed not to issue a categorical ban by stating that Section 122.4(i) still allows new discharges under certain circumstances. As explained in Section II *infra*, the circumstances as articulated by the Ninth Circuit are entirely illusory.

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[5] Section 122.4(i) applies regardless of whether EPA or a state is the NPDES permitting authority. *See* 40 C.F.R. §123.25.

[6] *Cf. Thomas Jefferson University v. Shalala*, 512 U.S. 504, 512 (1994) ("[T]he agency's interpretation [of its regulation] must be given controlling weight unless it is plainly erroneous or inconsistent with the regulation.") (Internal citations omitted).

The Minnesota Supreme Court properly construed the "cause or contribute" language of Section 122.4(i) in *Annandale*. The court found *Arkansas* to be inconsistent with a categorical ban on discharges in impaired waters and consistent with CWA permitting authorities having broad discretion to determine which NPDES discharges serve the public interest. *Annandale*, 731 N.W.2d at 520-21, 524. Accordingly, the Minnesota Supreme Court held that a NPDES permit may properly issue for a new discharge to impaired waters—provided the permitting authority used its specialized expertise and skill to determine that the discharge will not harm water quality. *Id.* *Crutchfield* likewise acknowledges that the CWA vests broad discretion in the NPDES permitting authority to ascertain whether a new discharge would cause or contribute to the violation of water quality standards. *Crutchfield*, 612 S.E.2d at 255.

B. The Use of Offsets Is Consistent With the CWA and Can Ensure Attainment of Water Quality Standards

Pinto Creek frustrates not just the ability of a new source or new discharger to obtain a permit, but the use of offsets to achieve water quality standards. The purpose of the CWA is to "restore and maintain the chemical, physical, and biological integrity of the Nation's waters." 33 U.S.C. §1251(a). Accordingly, the CWA establishes a framework for water quality control and authorizes EPA and states to use their expertise to develop and implement the specifics. For

example, the CWA requires states to adopt and comply with water quality standards to protect the designated uses of the Nation's waters. 33 U.S.C. §1313(c). For waters that do not meet their water quality standards, the CWA requires EPA and the states to develop total maximum daily loads[7] [hereinafter TMDL] to bring the impaired waters into compliance. 33 U.S.C. §1313(d).

Offsets, which involve reducing pollutant contributions from sources other than the permit holder, can be a fundamental component of long-range, area-wide programs contemplated under *Arkansas* to alleviate and eliminate water pollution consistent with the CWA. Offsets may occur between point sources or between point sources and nonpoint sources, which are not subject to NPDES permitting and can cause or contribute to water quality impairment. As subsequently explained, offsets provide opportunities to comply with or do better than water quality standards at lower costs and sooner than traditional regulatory approaches. Consequently, offsets may eliminate the need for a TMDL or be vital to its implementation.

Offsets can lead to or take the form of a market-based trading program. *See* 64 Fed. Reg. 46058,

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[7] A TMDL allocates the loading capacity of a water body or segment thereof for a pollutant among point sources, nonpoint sources and natural background to implement the applicable water quality standards. 33 U.S.C. §1313(d)(1)(C); 40 C.F.R. §130.2(f), (i).

46065 (Aug. 23, 1999). As the Supreme Court of Minnesota recognized in *Annandale*, much of the rationale for market-based trading applies to the use of offsets to administer and enforce water quality regulations. *Annandale*, 731 N.W.2d 502, 522.

1. Offsets in the Form of Market-Based Trading Improve Water Quality and Provide Other Benefits

Like offsets in general, water quality trading is an innovative and incentive-based tool that allows sources to meet regulatory obligations through pollutant reductions from other sources that discharge to the same watershed. EPA Fact Sheet, Water Quality Trading Policy (Jan. 13, 2003), available at http://www.epa.gov/owow/watershed/trading/finalpolicy2003.pdf (last visited June 27, 2008); EPA Water Quality Trading Toolkit for Permit Writers, 4 (Aug. 2007), available at http://www.epa.gov/npdes/pubs/wqtradingtoolkit_fundamentals.pdf (last visited June 27, 2008) [hereinafter Water Quality Trading Toolkit for Permit Writers]. Trading allows new and expanding sources to offset their additional pollution loads. EPA, Draft Framework for Watershed-Based Trading xiv (May 30, 1996), available as document number 800R96001 at http://nepis.epa.gov/EPA/html/Pubs/pubtitleOW.htm (last visited June 27, 2008) [hereinafter Draft Framework for Watershed-Based Trading].

Water quality trading is more cost-effective than traditional approaches for achieving water quality

standards and benefits. EPA, Water Quality Trading Assessment Handbook 1 (Nov. 2004), available at http://www.epa.gov/owow/watershed/trading/handbook/docs/ch1-national-wqt-handbook-2004.pdf (last visited June 27, 2008) [hereinafter Water Quality Trading Assessment Handbook]. Trading relies on stakeholder involvement and provides flexibility for communities within a watershed to grow and prosper while they protect or restore water quality. *Id.*; *see* Water Env't Research Found., Executive Summary—Credit Trading in the Fox-Wolf Basin: Exploring Legal, Economic, and Technical Issues (2001); Water Env't Research Found., Executive Summary—Nitrogen Credit Trading in Maryland: A Market Analysis for Establishing a Statewide Framework (2002). The affordability and flexibility of trading allows communities to accelerate or increase the implementation of pollution control measures. Water Quality Trading Assessment Handbook, *supra,* at 1; Draft Framework for Watershed-Based Trading, *supra,* at xii. Communities that trade pollutant loadings may realize water quality benefits sooner or to a greater degree than otherwise possible and add designated uses for waters. Water Quality Trading Assessment Handbook, *supra,* at 1; Draft Framework for Watershed-Based Trading, *supra,* at xii.

In January 2003, EPA adopted the Water Quality Trading Policy [hereinafter Trading Policy] to guide states and tribes on how to develop and implement water quality trading programs. 68 Fed. Reg. 1608 (Jan. 13, 2003). EPA explained that despite the

NPDES program, about half of the Nation's waters do not support their designated uses. 68 Fed. Reg. at 1609. EPA further explained that trading capitalizes on economies of scale and control-cost differentials among and between sources to offer greater efficiency in achieving water quality goals. *Id.*

EPA's Trading Policy encourages trading for myriad purposes, including to implement TMDLs or "offset[ ] new or increased discharges resulting from growth in order to maintain levels of water quality that support all designated uses." 68 Fed. Reg. at 1610. In fact, "EPA interprets 40 CFR 122.4(i) to allow for a new source or new discharger to compensate its entire increased load through trading." Water Quality Trading Toolkit for Permit Writers, *supra,* at 24. The Trading Policy encourages "pre-TMDL trading in impaired waters to achieve progress towards or the attainment of water quality standards." 68 Fed. Reg. at 1610. EPA supports pre-TMDL trading that achieves a net reduction of the pollutant traded or reduces loadings to a specified cap supported by baseline information on pollutant sources and loadings. *Id.* EPA also supports pre-TMDL trading that achieves a direct environmental benefit relevant to the causes or conditions of the impairment. *Id.* "If pre-TMDL trading does not result in the attainment of applicable water quality standards, EPA expects a TMDL to be developed." *Id.*

The Trading Policy encourages states to develop regulations, guidance or other tools to facilitate statewide or watershed-based trading programs.

Water Quality Trading Toolkit for Permit Writers, *supra*, at 7. Twenty-four states have or are developing frameworks for water quality trading or otherwise allow trading. These states include Oregon, Idaho, Colorado, Michigan, Ohio, Pennsylvania, Vermont, Minnesota, Florida, West Virginia, Delaware, Virginia, Maryland, Connecticut, California, Nevada, Arizona, New Mexico, Wisconsin, North Carolina, Georgia, New Jersey, New York, and Massachusetts. EPA, State and Individual Trading Programs, www.epa.gov/owow/watershed/trading/tradingmap.html (last visited June 27, 2008).

For example, Colorado issued a statewide pollutant trading policy in 2004 after 25 years of implementing traditional pollutant controls that did not prevent or eliminate the impaired status of waters. Colo. Dept. of Pub. Health and Env't, Colorado Pollutant Trading Policy 1 (Oct. 2004), available at http://www.cdphe.state.co.us/wq/PermitsUnit/PolicyandGuidance/TradingPolicy.pdf (last visited June 27, 2008). The policy provides a framework for trading and outlines use limitations and minimum trade criteria. *Id.* The policy allows for long-term improvements in water quality through the purchase or retirement of credits. *Id.* at 3. The policy also allows offsets for new or increased discharges. *Id.* Further, the policy encourages trading in impaired waters before, during and after the development of a TMDL. *Id.* at 12-13.

Trading is an important means for states to address the impairment of interstate waters such as the Chesapeake Bay. Nutrients and other pollutants

impair the Chesapeake Bay, which does not yet have TMDLs in place. EPA, List of Impaired Waters for 2006 (2006), available at http://iaspub.epa.gov/tmdl_waters10/waters_list.control?state=MD&wbtype=BAY&p_cycle=2006 (last visited June 27, 2008). To address the impairment and accommodate population growth, Maryland, Pennsylvania, Virginia, the District of Columbia, and EPA formally agreed to reduce nutrients to specified levels [hereinafter Chesapeake Agreement]. Accordingly, the states are turning to trading to control nutrients in the Chesapeake Bay and its tributaries. For example, Virginia adopted a trading program that requires new or expanded facilities and significant dischargers to meet annual nutrient load allocations. *See* Va. Code Ann. §62.1-44.19:15. Virginia's trading program authorizes the reduction of nutrients from both point and nonpoint sources. *See* Va. Code Ann. §62.1-44.19:12. *Id.*

2. The Availability of Offsets Outside the Trading Context Is Critical For States to Comply With Water Quality Standards

States use offsets outside the market-based trading context to address factors that cause or contribute to violations of water quality standards. For example, offsets are essential to California's strategies to attain water quality standards for waters impaired by mercury and nutrients. In July 2007, California approved a revised TMDL for mercury in the San Francisco Bay. Cal. State Water Resources

Control Board, Res. No. 2007-0045, Approving an Amendment to the Water Quality Control Plan for the San Francisco Bay Region to Establish Mercury Fish Tissue Objectives, etc. (July 17, 2007), available at http://www.waterboards.ca.gov/board_decisions/adopted_orders/resolutions/2007/rs2007_0045.pdf (last visited June 27, 2008). The implementation plan for the TMDL calls for aggressive strategies to prevent and reduce mercury loadings to attain the wasteload allocations. Cal. Regional Water Quality Control Board, San Francisco Bay Region, Mercury in San Francisco Bay, Proposed Basin Plan Amendment and Staff Report, etc. (Aug. 1, 2006) [hereinafter Mercury in San Francisco Bay] at III-1, III-5, available at http://www.swrcb.ca.gov/sanfranciscobay/water_issues/programs/tmdls/sfbaymercury/sr080906.pdf (last visited June 27, 2008). The implementation plan includes adaptive management to refine the TMDL every five years and the allowance of offsets in new and modified NPDES permits. Mercury in San Francisco Bay, *supra*, at Appendix pp. A-24—A-27.

In November 2007, California issued a general NPDES permit for municipal and industrial wastewater discharges of mercury to the San Francisco Bay. Cal. Regional Water Quality Control Board, San Francisco Bay Region, Order No. R2-2007-0077 (Nov. 1, 2007) [hereinafter Order No. R2-2007-0077], available at http://www.waterboards.ca.gov/sanfranciscobay/water_issues/programs/tmdls/sfbaymercury/r2-2007-0077final.pdf (last visited June 27, 2008). The permit contains provisions to implement the TMDL and

anticipates the development of an offset program as a "necessary" tool to achieve the wasteload allocations. *Id.* at 22 and F-15. In response to the TMDL and because mercury impairs nearby waters of the Sacramento-San Joaquin River Delta, California is developing an offset program for mercury discharges to the entire Bay-Delta system. *Id.* at 1. The state expects that the offset policy will not only allow dischargers to meet their wasteload allocations, but also permit the expansion of existing discharges and initiation of new discharges. *Id.* at 1. The state also expects the offset policy to reflect that point sources alone cannot reduce or eliminate mercury loadings to achieve the water quality standards. *Id.* at 2. Rather, nonpoint sources must be a part of the offset strategy. *Id.* at 2. Under the offset policy contemplated, projects must produce a net environmental benefit, dischargers must implement technology-based controls required by the CWA, and offset requirements in NPDES permits must be enforceable. *Id.* at 3-4.

In addition, California is proposing a nutrient offset program for the POTW of the City of Santa Rosa [hereinafter City] that discharges into the Laguna de Santa Rosa [hereinafter Laguna]. *See* Cal. Regional Water Quality Control Board, North Coast Region, Draft Res. No. R1-2008-0061 [hereinafter Draft Res. No. R1-2008-0061], available at http://www.waterboards.ca.gov/northcoast/board_info/board_meetings/07_2008/pdf/sr_res_0008_0061/08_0061_Res.pdf (last visited June 27, 2008). The Laguna is impaired for nutrients, and the TMDL to correct the impairment

will not be complete until the year 2019. *Id.*; Cal. Regional Water Quality Control Board, North Coast Region, Draft Res. No. R1-2008-0061; Proposed 2006 CWA Section 303(d) List Of Water Quality Limited Segments, North Coast Regional Board (Sept. 15, 2006), available at http://www.swrcb.ca.gov/tmdl/docs/303dlists2006/pro1draft303d.pdf (last visited June 27, 2008).

The draft resolution for the offset program for the City's POTW explains: "The Nutrient Offset Program will provide a framework for achieving additional nutrient load reductions during the interim period before the nutrient TMDL for the Laguna de Santa Rosa is implemented." Draft Res. No. R1-2008-0061. The offset program encourages the City to take actions it would not otherwise take to improve water quality in the Laguna, such as removal of sediment and an invasive weed that contributes to the impairment. Draft Res. No. R1-2008-0061. The City's NPDES permit includes effluent limitations of "no net loading" for nutrients that take effect in the year 2011 if the TMDL is not complete. Cal. Regional Water Quality Control Board, North Coast Region, Order No. R1-2006-0045 (Sept. 20, 2006) at 12-13, available at http://www.waterboards.ca.gov/northcoast/board_decisions/adopted_orders/pdf/2006/061003_0045_SantaRosaWDRs.pdf (last visited June 27, 2008). The permit authorizes the City to use offsets to comply with the effluent limitations. *Id.* at 13, n.5. The offset program would allow the City to accrue offsets by improving the Laguna's water quality before the year

2011 and, consequently, before the TMDL's completion. Draft Res. No. R1-2008-0061.

Pinto Creek calls into question the use of offsets in the pre-TMDL context and could frustrate future attempts of the City to expand its wastewater capacity or construct new POTWs to accommodate increased growth. This squarely conflicts with offset and trading programs and, more importantly, the CWA's goal to improve water quality through the elimination of factors that cause or contribute to impairment.

II. *PINTO CREEK* WILL ELIMINATE VALUABLE OFFSET PROGRAMS THAT IMPROVE WATER QUALITY

Offset programs may range from a relatively simple offset arrangement between two point sources, as in *Pinto Creek* and *Annandale*, to formal credit exchange programs such as those in Connecticut and Virginia, *see* Va. Code Ann. §62.1-44.19:12, Conn. Public Acts 01-180 (2001). *See* EPA, Watershed-based National Pollutant Discharge Elimination System (NPDES) Permitting Technical Guidance 47, 49 (Aug. 2007), available at http://www.epa.gov/npdes/pubs/watershed_techguidance_entire.pdf (last visited June 27, 2008). Whatever the form, all offset and trading programs share the goal to protect designated uses of waters in the most flexible and cost-efficient manner practicable.

Pinto Creek jeopardizes progress made by EPA and the states with the use of offsets and market-based trading programs. Under the Ninth Circuit's ruling, if a permit for a new source or new discharger allows *any* loading of a pollutant for which the receiving water is listed as impaired, the discharge is *presumed* to "cause or contribute" to a violation of water quality standards—even if the discharge is offset so as to improve the water's overall health. *Pinto Creek*, 504 F.3d at 1014. The Ninth Circuit's interpretation of "cause or contribute" in this manner undermines the CWA.

Prior to *Pinto Creek*, EPA and states could reasonably conclude that a discharge "causes or contributes" to a violation of water quality standards only if the discharge degrades water quality. *Cf. Arkansas*, 503 U.S. at 1059-60 (deferring to EPA administrative law judge's finding that there would be no "detectable change in water quality" and therefore no violation of water quality standards). This interpretation is critical to the success of state water quality programs. The Ninth Circuit's overly restrictive interpretation of Section 122.4(i) will frustrate state permitting efforts as states interpret "cause or contribute" under their offset and trading policies.

Based on the Ninth Circuit's erroneous interpretation of "cause or contribute," all new sources and new dischargers that discharge to impaired waters may now receive a NPDES permit only upon demonstration that: (1) a TMDL that assigns load

allocations to the new discharger is in place; (2) there are compliance schedules for "any"[8] discharges to the impaired water; and (3) the TMDL and compliance schedules evince attainment of water quality standards. *Pinto Creek*, 504 F.3d at 1012-14.

Many of the Nation's impaired waters lack approved TMDLs. *See* EPA, Total Maximum Daily Loads: National Section 303(d) List Fact Sheet, available at http://oaspub.epa.gov/waters/national_rept.control (last visited June 27, 2008) (indicating 40,752 impaired waters on 303(d) list and 33,399 TMDLs developed since 1995). In California, there are currently 691 water bodies listed and most are listed for multiple pollutants. *See* EPA, 2006 Section 303(d) List Fact Sheet for California, available at http://iaspub.epa.gov/waters10/state_rept.control?p_state=CA&p_cycle=2006#TPOL (last visited June 18, 2008). A TMDL must be developed for each cause of impairment, but most of these TMDLs will not be complete until the year 2019. *Id.*

Indeed, TMDLs may take 13 years or more to complete—a very long time for a local government

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[8] The Ninth Circuit's use of "any" implies that "all" discrete conveyances of pollutants that may be a "discharge" under 40 C.F.R. §122.2 must be subject to compliance schedules—even where scheduling of less than all sources would attain water quality standards.

considering construction of a new POTW to wait.[9] Even where a TMDL is in place, the TMDL often will not include a load allocation for new sources. Granting a new source or new discharger a load allocation after initial TMDL adoption will often take many years and require revision to the entire TMDL framework—assuming that additional wasteload allocations are even available. *See generally City of Arcadia v. State Water Resources Control Board*, 135 Cal.App.4th 1392 (Cal.Ct.App. 2006) (TMDL with a waste load allocation of "zero").

Moreover, Section 122.4(i)(2) as interpreted in *Pinto Creek* requires a practical impossibility. The permitting authority must issue "compliance schedules" to all "discharges" in the impaired segment.[10] *Pinto Creek* suggests that compliance schedules would need to issue to essentially any anthropogenic source of water pollution in the impaired water body—which is simply not a regulatory option provided by or enforceable under the CWA.[11]

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[9] *See generally* William L. Andreen, *Water Quality Today—Has the Clean Water Act Been a Success?*, 55 Ala. L. Rev. 537, 592 (2004).

[10] Section 122.4(i)(2) speaks of subjecting "dischargers" (not "discharges") to compliance schedules, but the Ninth Circuit confused the two distinct concepts in concluding that EPA must make all discharges subject to compliance schedules. *Pinto Creek*, 504 F.3d at 1014.

[11] "Schedules of compliance" means a "schedule of remedial measures *included in a permit*. . . ." 40 C.F.R. §122.2 (emphasis added). CWA permitting authorities generally have no ability to

(Continued on following page)

Assuming that a new source or new discharger demonstrates compliance with Section 122.4(i), the Ninth Circuit would still require the source to show with scientific certainty before the close of the comment period for the permit that implementation of the TMDL would be effective. For a majority of TMDLs, this will be an impossible task. Where a permitting authority has insufficient information to understand entirely the causes of impairment in a particular water body, interim load allocations may be established based upon current information and understandings, but these interim limitations are subject to revision upon further data generation and study. *See* Mercury in San Francisco Bay, *supra,* at Appendix pp. A-24—A-27. The implementation phase of the TMDL then generates needed data and allows a permitting authority to evaluate the effectiveness of best management practices. If the data or special studies reveal that adjustments are necessary, the permitting authority revises the load and wasteload allocations.

The Ninth Circuit's approach to Section 122.4(i) seems to foreclose this type of critical adaptive management in the TMDL context by apparently requiring that the permitting authority be certain of attainment of water quality standards prior to issuance of the permit. All of the elements of Section

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subject a nonpoint source to a NPDES permit or compliance schedule. *See Sierra Club v. Meiburg*, 296 F.3d 1021, 1026 (11th Cir. 2002); *Or. Natural Desert Ass'n v. Dombeck*, 172 F.3d 1092, 1097 (9th Cir. 1998).

122.4(i) appear to have been met in *Pinto Creek*. A TMDL that contained load allocations for Carlota (the permit applicant) was in place. *In re Carlota Copper Co.*, 11 E.A.D. at 759-60. Carlota's permit contained a list of compliance measures to be completed prior to commencement of any discharge, and the TMDL projected future attainment based upon Carlota's nonpoint source offsets. *Id.* at 703-04, 741, 759-60. The offsets would remediate an abandoned mine site reasonably believed to be one of the primary sources of loading to the watershed. *Id.* at 738, 743, 770. However, because of residual uncertainty associated with the manner in which the abandoned mine contributes pollutant loadings and the variability of anticipated loadings under different precipitation scenarios, EPA believed out of an abundance of caution that further study and data gathering were appropriate. EPA, Total Maximum Daily Load for Copper in Pinto Creek, Arizona 34-36 (2001), available at http://www.epa.gov/region09/water/tmdl/pinto/pinto.pdf (last visited June 28, 2008).

The Ninth Circuit deemed EPA's approach insufficient to satisfy Section 122.4(i). Though the reasoning of the Ninth Circuit on this point is difficult to discern, it appears that the court's primary concern was EPA's factual determination that "partial remediation of the Gibson Mine discharge" would ensure attainment of water quality standards. *Pinto Creek*, 504 F.3d at 1014. Such judicial scrutiny of the technical conclusions of regulatory agencies bodes dangerously for any number of TMDLs currently in development because TMDLs are complex and

uncertain undertakings that can take years of continued monitoring to confirm the efficacy of mandated reductions and best management practices. *See generally* EPA, Memorandum: Clarification Regarding "Phased" Total Maximum Daily Loads 3 (Aug. 2, 2006), available at http://www.epa.gov/owow/tmdl/tmdl_clarification_letter.html (last visited June 27, 2008).

Offset programs across the United States rely upon adaptive management to improve water quality, *see* Mercury in San Francisco Bay, *supra,* at Appendix pp. A-24—A-27, subject to adjustment of the TMDL where data support such adjustments. If, as suggested by *Pinto Creek*, potential new sources or new discharges must wait until the permitting authority obtains *absolute certainty* of future attainment of water quality standards, the sources may wait many years—well past the 13 years that it takes for permitting authorities to develop a TMDL and far too long for Section 122.4(i) to be useful.

Offsets and market-based trading programs are elegant solutions for EPA and states to address complex water quality problems that involve multiple sources. Trading and offsets present a "win-win" scenario: the watershed gets more reductions than it would with an effective compliance schedule because of the offset ratios of state offset and trading policies,[12] and the new point source is able to enter the watershed to provide critical municipal utility

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[12] *See, e.g., Annandale*, 731 N.W.2d at 524 (25:1 offset ratio).

services to a growing population. *Pinto Creek* presents a "lose-lose" scenario. The potential new source or new discharger chooses not to build a new facility because compliance with the Ninth Circuit's restrictive interpretation of Section 122.4(i) is financially infeasible. Impaired waters lose because existing pollutant sources will not be further reduced. Communities lose because new state of the art treatment facilities may be precluded from discharging, which prolongs reliance on outdated facilities that discharge to land and are not subject to the NPDES program.

The inflexible approach of the Ninth Circuit in *Pinto Creek* jeopardizes the states' use of offsets and trading programs. This Court should step in to clarify that the *Annandale* approach, which allows new permits in impaired waters upon demonstrated improvement to water quality, is the correct one.

CONCLUSION

State and local populations across the United States continue to grow, and with this growth comes increased strains on natural resources and greater challenges for state and local governments to provide adequate and environmentally responsible wastewater treatment services. The Ninth Circuit's interpretation of Section 122.4(i) in *Pinto Creek* does not solve the environmental problems associated with growth. Instead, the decision precludes promising solutions. Requiring POTWs to demonstrate current attainment of water quality standards prior to the issuance of a NPDES permit will impose a categorical ban on new

discharges in all but the rarest of circumstances. *Pinto Creek* will serve only to slow water quality improvement and frustrate local government efforts to provide vital municipal wastewater services in a more environmentally beneficial manner. The Ninth Circuit's second-guessing of EPA eliminates tools used effectively by permitting authorities to comply with water quality standards and generally improve water quality as populations grow.

In *Arkansas*, this Court appreciated the difficult task that EPA and the 45 states that administer NPDES programs face in developing strategies and incentives to meet the CWA's goals. As in *Arkansas*, 503 U.S. at 113-14, EPA made a reasoned policy choice in *Pinto Creek* premised upon site-specific facts. EPA used its technical expertise to determine that allowing the new discharge offset by pollution reductions would produce a net benefit in water quality. 11 E.A.D. at 784. In substituting its judgment for the reasoned decision that EPA made in interpreting its own regulation, the Ninth Circuit did precisely what this Court cautioned against in *Arkansas*. The court established a "categorical ban" that frustrates "the construction of new plants that would improve existing conditions." *Arkansas*, 503 U.S. at 108.

This Court should grant certiorari to rule that the courts in *Annandale* and *Crutchfield* correctly held that the CWA allows the use of offsets to improve water quality and the Ninth Circuit misread the CWA in disallowing the use of offsets. Permitting authorities need regulatory flexibility to issue NPDES

permits to new sources and new dischargers to impaired waters where the discharges are offset to provide a net improvement in water quality. The Ninth Circuit erred when it held otherwise.

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